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No. 79-1198

In the Supreme Court of the United States

OCTOBER TERM, 1979

WARREN SPANNAUS, ATTORNEY GENERAL
OF MINNESOTA, PETITIONER

v.

NEIL GOLDSCHMIDT, SECRETARY, DEPARTMENT OF
TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
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1. Petitioner, the Attorney General of the State of Minnesota, and several other state and local government officials instituted this action in the United States District Court for the District of Kansas against the Secretary of Transportation, the Administrator of the Federal Railroad Administration and the National Railroad Passenger Corporation (Am-

trak), to enjoin the implementation of proposed cutbacks in passenger rail service. At the time of the commencement of the action, the proposed cutbacks were to be made pursuant to the Secretary's authority under the Amtrak Improvement Act of 1978 (1978 Act), Pub. L. No. 95-421, 92 Stat. 923, which directed the Secretary to prepare recommendations for a route system for Amtrak and to submit those recommendations in a Final Report to Congress pursuant to Section 4 of the 1978 Act.[1]

On September 28, 1979, the district court issued a temporary restraining order prohibiting for ten days the discontinuance of three passenger trains, on the ground, *inter alia*, that petitioner and the other plaintiffs had raised issues concerning whether the Secretary's Final Report complied with the Amtrak Improvement Act of 1978 and the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4347 (NEPA) (Pet. App. A-1 to A-4). On October 4, 1979, the district court dissolved the restraining order and denied petitioner's request for a preliminary injunction in light of the passage of the Amtrak Reorganization Act of 1979 (1979 Act), Pub. L.

[1] The 1978 Act provided that the Secretary could implement the recommendations in the report if Congress did not affirmatively disapprove them within 90 days. 92 Stat. 925. The report was submitted to Congress on January 31, 1979 (Pet. 10). Because the recommendations were not vetoed by Congress, the Secretary proposed to discontinue the trains by October 1, 1979 (Pet. 11). However, by subsequent legislation, discussed below, Congress affirmatively redesigned the Amtrak system and ratified discontinuance of the particular trains involved here.

No. 96-73, 93 Stat. 537, on September 29, 1979 (Pet. App. A-4 to A-9). The court of appeals affirmed on the ground that, by passing the 1979 Act, Congress had itself made the determination of what the nation's basic system of passenger rail service would be (Pet. App. A-9 to A-19; 608 F.2d 861).

2. Petitioner contends (Pet. 16-17) that because the 1979 Act did not impliedly repeal NEPA, the implementation of the proposed discontinuances of passenger rail service should be enjoined on the ground that the Secretary's Final Report did not comply with the procedural requirements of that statute. Because the discontinuances presently at issue are the result of congressional, rather than administrative, action, no issue of repeal, either express or implied, is raised by the facts of this case.

Although Section 4 of the 1978 Act arguably contemplated no more than a passive role for Congress, in that the Secretary's Final Report would be approved unless Congress took specific action to disapprove it, in the 1979 Act Congress determined to redesign by itself a basic system of rail service. Thus, Section 104 of the 1979 Act expressly defines the "basic system" of rail service in the country and incorporates as part of the definition the routes "designated by the Secretary under section 4 of the Amtrak Improvement Act of 1978 * * * and approved by the Congress * * *." 93 Stat. 538.[2] In passing the 1979

[2] The court of appeals found (Pet. App. A-14) that the statutory reference to Section 4 of the 1978 Act designates the Secretary's Final Report.

Act Congress did not merely rubber-stamp the Secretary's report; at various points in designing the system it substituted its own route objectives for those recommended by the Secretary (see Pet. App. A-13 to A-14).

The legislative history further manifests the intent of Congress to establish unconditionally a statutory route structure and to approve only those portions of the Secretary's Final Report that it found useful in accomplishing that objective. For example, Representative Florio, chairman of the subcommittee that drafted the bill, reported that "the Commerce Committee * * * reached the conclusion that the [Secretary's] plan had gone too far" and that the "Committee chose to use this authorization bill to redesign the Amtrak route system." 125 Cong. Rec. H6487 (daily ed. July 24, 1979). See also 125 Cong. Rec. H8626 (daily ed. Sept. 27, 1979) ("[w]ith the enactment of [the 1979 Act], Congress has ratified the process used by the Secretary in restructuring Amtrak and has modified his restructuring where it was clearly in the public interest to do so") (remarks of Rep. Madigan).

The requirements of NEPA are not applicable to congressional, as contrasted with administrative, action.[3] Thus, as the court of appeals observed, there is

> no problem of mere implied repeal of the procedural provisions of NEPA and the other statutes,

[3] 42 U.S.C. 4332 provides in pertinent part that "to the fullest extent possible * * * all *agencies* of the Federal Government shall" comply with the Act (emphasis added).

> but a direct Congressional decision designing the basic rail system, without the necessity of following those procedures.

Pet. App. A-17 to A-18.[4] For the same reason, the court below correctly concluded that even if this case raised an issue of implied repeal, petitioner's reliance on *TVA* v. *Hill*, 437 U.S. 153 (1978), would be misplaced. The 1979 Act is not an appropriations statute, with respect to which Congress might not be expected "to review exhaustively the background of [the legislation] * * *." *TVA* v. *Hill*, *supra*, 437 U.S. at 190. Rather, it is an affirmative expression of legislative policy resulting from Congress's exhaustive review and independent alteration of the Secretary's Final Report.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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[4] Respondent National Railroad Passenger Corporation is thus correct in urging that the issue presented by petitioner has become moot. Petitioner challenges the Secretary's compliance with NEPA procedures in preparing the agency's Final Report. However, the route system that emerged from Congress is not the one proposed by the Secretary, but rather constitutes a legislative design of Congress itself, now mandated by statute. Moreover, as Amtrak observes, Section 104 of the 1979 Act provides that the prevailing route system consists only of rail lines "approved by the Congress." Since Congress did not approve the continuance of the particular trains that petitioner seeks to retain, a judicial determination that the Secretary should not have urged Congress to remove them from service would be academic.

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